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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Fees for Ancillary or Supplementary)	MM Docket No. 97-247
Use of Digital Television Spectrum)	
Pursuant to Section 336(e)(1))	
of the Telecommunications Act of 1996)	

OPPOSITION TO PETITION FOR RECONSIDERATION

The National Cable Television Association ("NCTA") hereby opposes the petition for reconsideration submitted by the National Association of Broadcasters and the Association for Maximum Service Television, Inc. ("Broadcasters") in the above captioned proceeding.

In its Report and Order, the Commission established the fees to be paid by broadcasters if they choose to use their digital television spectrum to provide "ancillary or supplementary" services. NCTA participated in the Commission's rulemaking proceeding because some of the "ancillary and supplementary services" that broadcasters may provide (such as subscription television services) may also be provided by NCTA's members. NCTA has an interest in ensuring that the provision of such services by broadcasters is not unfairly subsidized by the imposition of artificially low spectrum fees – an interest supported by the statutory fee criteria.

Under the terms of Section 336 of the Communications Act of 1934, as amended, 47 U.S.C. § 336, broadcasters are to pay digital spectrum fees *only* if they use the spectrum to provide ancillary or supplementary services – which are defined as services

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(A) for which the payment of a subscription fee is required in order to receive such services, or

(B) for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required).¹

To the extent broadcasters provide free television service, their use of the spectrum is free of charge. The Commission's rules require only that broadcasters provide at least one channel of free television, which may be a high-definition or a standard-definition channel. They may use *all* of their spectrum to provide free service, such as a single high-definition channel or multiple standard-definition channels. Or they may choose to provide one or more standard definition channels, and use their remaining spectrum to provide ancillary and supplementary services at a charge. It's up to them.

Congress directed the Commission to consider several factors in establishing the fees to be assessed for ancillary and supplementary use of the broadcasters' digital spectrum. Specifically, fees are to "be designed (i) to recover for the public a portion of the value of the public spectrum resource made available for such commercial use, and (ii) to avoid unjust enrichment through the method employed to permit such uses of that resource."² In addition, the fees are supposed to "recover for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered had such services been licensed pursuant to the

¹ 47 U.S.C. § 336(e)(1).

² 47 U.S.C. § 336(e)(2).

[auction] provisions of section 309(j) of this Act and the Commission's regulations thereunder.”³

This is obviously an inexact science. Nevertheless, the Commission expressly explained why requiring broadcasters to pay five percent of their gross revenues from the provision of ancillary and supplementary services was consistent with each of the statutory criteria.⁴

Broadcasters' principal basis for seeking reconsideration is that, in their view, the Commission erred in determining that five percent of gross revenues was “an amount that, to the extent feasible, equals but does not exceed” the amount that would have been recovered at auction. Specifically, Broadcasters complain that the Commission “failed to consider” economic evidence that they submitted regarding the supposedly “low and declining value of comparable spectrum.”⁵

The Commission did not “fail to consider” Broadcasters' evidence. To the contrary, as the Broadcasters themselves ultimately concede, the Commission expressly addressed the very arguments that Broadcasters advance again in their petition for reconsideration. And it explained precisely why it disagreed with those arguments.

As the Commission stated,

[t]he auction values realized by the Commission in conducting a particular spectrum auction reflect factors that are specific to the particular spectrum being auctioned. These factors include the anticipated demand for the telecommunications services provided using the particular spectrum and the technological uncertainty associated with

³ 47 U.S.C. § 336(e)(2)(C).

⁴ *See Report and Order*, ¶¶ 23-30.

⁵ Petition for Reconsideration at 1-2.

the application. In contrast to the non-broadcast spectrum, we believe the value of broadcast spectrum has been increasing, rather than decreasing.⁶

Broadcasters contend that the value of broadcast spectrum has nothing to do with the estimated auction value of digital spectrum, to the extent that such spectrum is used to provide ancillary and supplementary services. But this is obviously not the case. As the Commission suggested, auction prices reflect the risk and uncertainty accompanying the authorized uses of the spectrum. And the risk and uncertainty associated with the use of broadcasters' digital spectrum to provide ancillary and supplementary services are significantly diminished by the potential use of the spectrum to provide non-feeable broadcast services.

First, as NCTA pointed out in its comments, because broadcasters must use their digital spectrum to provide at least one channel of free, advertiser-supported television,

the incremental or marginal cost of providing any ancillary and supplementary revenue-generating services will be negligible. The most substantial costs incurred by broadcasters, such as transmitters and towers, will be "sunk" or fixed costs that are already incurred in connection with the provision of non-feeable services, and little more will be required to provide feeable services.⁷

Moreover, broadcasters who choose to offer ancillary and supplementary services retain the flexibility to go back to using the spectrum to provide proven, advertiser-supported, non-feeable services. The rising value of broadcast spectrum illustrates how valuable this option is, and how much it reduces the risk associated with the provision of ancillary and supplementary services.

⁶ *Report and Order*, ¶ 28.

⁷ NCTA Comments at 11 (May 4, 1998).

It would, indeed, have been wholly inappropriate for the Commission to base digital broadcast spectrum fees for ancillary and supplementary use on recent spectrum auction revenues *without* adjusting for the significant differences in risk. To have done so would have resulted in precisely the “unjust enrichment” that the Commission has a statutory mandate to avoid.

Finally, Broadcasters contend that the Commission should have imposed a smaller fee in order “to encourage innovative uses of digital television technology.”⁸ That clearly is *not* one of the statutory criteria. Nothing in the statute suggests that spectrum fees should be designed either to encourage broadcasters to use their spectrum for feeable rather than non-feeable services.

Congress has decided that it is in the public interest for broadcasters to be given digital spectrum free of charge to the extent that the spectrum is used for free broadcast services. And it has decided that the public should recover a fair, marketplace price that avoids unjust enrichment of broadcasters, to the extent that the spectrum is used for ancillary and supplementary services. This distinction between non-feeable and feeable services suggests, if anything, an intention to encourage broadcasters to use the spectrum for free services (such as HDTV, which will generally require an entire 6 MHz channel) – and *not* for ancillary and supplementary services.

Moreover, in light of the Commission’s plans to require television viewers to buy new digital sets and/or converters for all their existing sets in order to watch any television at all, it would also seem more appropriate, as a matter of policy, to attempt to encourage the use of digital spectrum for HDTV and other *non*-feeable services.

⁸ Petition for Reconsideration at 7.

CONCLUSION

For the foregoing reasons, Broadcasters' petition for reconsideration should be denied.

Respectfully submitted,

A handwritten signature in cursive script, reading "Daniel L. Brenner".

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February 22, 1999

CERTIFICATE OF SERVICE

I, Anne Steward, do hereby certify that the foregoing **OPPOSITION TO PETITION FOR RECONSIDERATION** was served by first-class, postage pre-paid mail on this 22nd day of February, 1999, on the following:

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